

No. SC87392

IN THE SUPREME COURT OF MISSOURI

CHRISTIAN COUNTY, MISSOURI

Plaintiff/Respondent

vs.

EDWARD D. JONES AND COMPANY, LP,

d/b/a EDWARD JONES

Defendant/Appellant

AMICUS CURIAE BRIEF OF MISSOURI BANKERS ASSOCIATION

Transfer From
The Missouri Court of Appeals
Southern District
Division One
Appellate Court Case No. 26026

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Missouri Bankers Association (“MBA”) is an organization of state and nationally chartered banks, trust companies, savings and loans and savings banks located throughout Missouri. Founded in 1891, MBA represents over 30,000 bank employees in over 1800 banking locations in the State of Missouri. MBA is committed to serving the best interests of its members through education of its members and the consuming public, promoting economic development in Missouri and advocating on behalf of its constituents on issues of public importance.

Defendant/Appellant Edward D. Jones and Company, LP d/b/a Edward Jones (“Appellant” or “Jones”) appeals from a judgment (the “Judgment”) of the Circuit Court of Greene County, entered December 8, 2003, against Jones and in favor of Christian County, Missouri (“Respondent” or “Christian County”) in the amount of \$368,837.28, with interest at the rate of 9% from the date of conversion, June 21, 1996, for a total of \$601,240.80, plus costs. (LF 144-146).¹ Application for Transfer to this Court was granted on January 31, 2006.

This action involves the question of whether Jones is liable to Christian County for the return of the county’s funds held as trustee *ex maleficio* by Jones. Jones accepted a deposit from the Christian County former treasurer, Gary Melton (“Melton”), without qualifying as an authorized depository of county funds. The funds were misappropriated by Melton for his own personal use.

¹ The Legal File is referred to herein as “LF”.

Amicus MBA has an interest in the issues in this case as they apply to lawful and unlawful deposits of public funds, and particularly the question raised in this case *sub silentio*: whether the investment of public funds in money market mutual fund accounts, such as the “Daily Passport Cash Trust” account (LF 101, 103) offered by Jones in this case is authorized by the Missouri Constitution, including Art. IV, §15, and Art. VI, §23, or the Missouri Statutes in question, §110.130 *et seq.*² The constitutional issue has been raised below because it is inherent in the language of the statutes in question, which specifically reference the constitutional provisions, and therefore is an appropriate subject of review before this Court. Amicus submits this Brief principally to address this issue. The MBA has an interest in promoting the lawful use of government funds deposited with its Members, and of discouraging actions which seek to avoid the dictates of the Missouri Constitution and statutes in that respect.

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), Counsel for Amicus Curiae has contacted counsel for both parties and obtained their consent to the filing of this Brief.

² All references to statutes are to the Revised Statutes of Missouri (2000) unless otherwise indicated.

STATEMENT OF FACTS

Amicus curiae Missouri Bankers Association adopts and incorporates herein the Statement of Facts contained in the Brief of Plaintiff-Respondent.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT FOR THE RESPONDENT BECAUSE THE JUDGMENT IS CONSISTENT WITH THE MISSOURI CONSTITUTION OF 1945, AS AMENDED, ART. IV, §15 AND ART. VI, §23, AS WELL AS THE REVISED MISSOURI STATUTES (2000), §110.270, WHICH LIMIT THE INVESTMENT AUTHORITY OF COUNTIES OVER PUBLIC FUNDS, IN THAT THE “DAILY PASSPORT CASH TRUST” ACCOUNT OFFERED BY APPELLANT JONES IN THIS CASE IS A TYPE OF MONEY MARKET MUTUAL FUND ACCOUNT, AND INVESTMENT OF COUNTY FUNDS IN MONEY MARKET MUTUAL FUNDS ACCOUNTS IS NOT AUTHORIZED BY THE MISSOURI CONSTITUTION OR STATUTES.

Statutes

§ 110.270 R.S.Mo.

Constitutional Provisions

Mo. Const. Art. IV, § 15

Mo. Const. Art. VI, § 23

Other Authority

12 C.F.R. §330.15

H.B. 1735, 91st Mo. Gen. Assemb. (2002)

S.B. 1101, 91st Mo. Gen. Assemb. (2002).

Mo. Att’y Gen. Opinion No. 26-88 (1988) (1988 Mo. AG LEXIS 20)

Fed. Deposit Ins. Corp., Insured or Not Insured? A Guide to What Is and Is Not Protected by FDIC Insurance, at <http://www.fdic.gov/consumers/consumer/information/fdiciorn.html>.

II.

THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT FOR THE RESPONDENT BECAUSE THE JUDGMENT CORRECTLY APPLIED THE REQUIREMENTS OF CHAPTER 110, §§110.130 *et seq.*, WHICH OUTLINES THE PROCEDURE THAT MUST BE SUBSTANTIALLY FOLLOWED FOR A DEPOSITARY OF COUNTY FUNDS TO BE LEGALLY SELECTED AND WHICH PLACES SAFEGUARDS AROUND THOSE FUNDS IN THE HANDS OF PUBLIC OFFICIALS, IN THAT IT IS UNDISPUTED THAT APPELLANT HAD NOT BEEN SELECTED, AND HAD NOT QUALIFIED AS, A DEPOSITARY OF COUNTY FUNDS PURSUANT TO THE STATUTORY PROCEDURE WHEN MELTON TRANSFERRED COUNTY FUNDS FOR DEPOSIT WITH APPELLANT AND LATER MISAPPROPRIATED THOSE FUNDS TO HIS PERSONAL USE.

Cases

Marion County v. First Savings Bank of Palmyra, 80 S.W. 2d 861 (Mo. 1935)

Ralls County v. Commissioner of Finance, 66 S.W.2d 115, 116 (Mo. 1933)

In re Cameron Trust Co., 51 S.W.2d 1025 (Mo. 1932)

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§110.140 R.S.Mo.

§110.150 R.S.Mo.

§110.160 R.S.Mo.

§110.270 R.S.Mo.

Constitutional Provisions

Mo. Const. Art. IV, § 15

Mo. Const. Art. VI, § 23

III.

THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT FOR THE RESPONDENT BECAUSE APPELLANT’S CLAIMED DEFENSES OF ESTOPPEL, WAIVER AND LACHES ARE INAPPLICABLE IN THAT IT IS UNDISPUTED THAT (1) MELTON ACTED ILLEGALLY AND WITHOUT ANY AUTHORITY IN OPENING AND DEPOSITING COUNTY FUNDS IN THE “UNINCORPORATED ASSOCIATION” ACCOUNT WITH APPELLANT, AND IN LATER TRANSFERRING THE FUNDS FROM THAT ACCOUNT TO ACCOUNTS IN HIS OWN NAME, AND IT IS WELL-SETTLED THAT A GOVERNMENTAL BODY IS NOT ESTOPPED BY THE

ILLEGAL AND UNAUTHORIZED ACTS OF ITS OFFICERS; AND (2) APPELLANT, LIKE EVERYONE DEALING WITH PUBLIC OFFICERS AND FUNDS, WAS CHARGED WITH KNOWLEDGE OF THE LAWS ENACTED FOR THE PROTECTION OF PUBLIC PROPERTY AND FAILED TO TAKE NOTICE THEREOF, AND, THEREFORE, COULD NOT REASONABLY RELY ON ANY STATEMENTS OF MELTON OR THE FAILURE TO ACT BY OTHER COUNTY OFFICIALS AS THE BASIS OF AN ESTOPPEL.

Cases

B&D Inv. Co., Inc. v. Schneider, 646 S.W.2d 759 (Mo. banc 1983).

Fulton v. City of Lockwood, 269 S.W. 2d 1 (Mo. 1954).

In re Cameron Trust Co., 51 S.W.2d 1025 (Mo. 1932).

State ex rel. Southland Corp v. City of Woodson Terrace, 599 S.W.2d 529 (Mo. App. E.D. 1980).

Statutes

§ 110.270 R.S.Mo.

Constitutional Provisions

Mo. Const. Art. IV, § 15

ARGUMENT

Summary of the Argument

The Court should affirm the judgment of the trial court for many of the reasons set forth in the Brief of Respondent. In addition, in this Brief Missouri Bankers Association (“MBA”) sets forth yet other reasons for the Court to affirm the trial court’s ruling which have not been otherwise addressed.

The Missouri Constitution and Chapter 110 place limits on the investment authority that counties have over public funds. Neither the Missouri Constitution nor Statutes expressly authorize the investment of county funds in money market mutual fund accounts such as the “Daily Passport Cash Trust Account”³ offered by Jones in this case. Although similar in name to traditional money market *deposit* accounts, money market mutual fund accounts represent a substantially greater investment risk in that, unlike money market *deposit* accounts, they are not insured by the FDIC or any other agency of the federal government. Accordingly, the trial court ruled correctly, albeit for different reasons, that the deposit of County funds into the account opened by Jones in this case was not legally authorized.

³ The record in this case reveals that Jones offered an “unincorporated association” account as an investment product described as a “Daily Passport Cash Trust Account.” This Account was linked with a “no-load mutual fund”. (LF 101, 103). Throughout this Brief, the account may be referred to interchangeably as the “unincorporated association” account or the “Daily Passport Cash Trust Account.”

It is undisputed that Jones accepted public funds of Christian County without having qualified as a lawful depository pursuant to Chapter 110. As a matter of law, legal title to those funds did not pass to Jones and Jones held those funds as a trustee *ex maleficio* for the benefit of Christian County. There is sound public policy behind the constitutional and statutory requirements of qualification to hold county funds in public trust, and failure to follow that requirement must lead to a holding as a trustee *ex maleficio*, regardless of the intent of Jones or its belief that Melton would properly dispose of the funds. Both at the time that Jones opened the “unincorporated association” account, and at the time that Jones, transferred the funds at the direction of Melton to Melton’s individual account, thereby depriving Christian County of the use and benefit of those funds, Jones was absolutely liable to Christian County for the return of those funds and had no right to assume that Melton would make a proper disposition of those funds.

Jones’ argument that it is not liable to Christian County as a trustee *ex maleficio* for failing to comply with the requirements of Chapter 110 because it is a non-bank to which the requirements of the statute do not apply is unavailing. Jones’ argument relies on a strained reading of the statute that would nullify the protections for public funds created by the statute. More importantly, it ignores the constitutional mandate which cannot be overcome by the name it chooses for its operation. Jones’ estoppel theory, as well as similarly claimed affirmative defenses, is equally unavailing because it is well-settled that a governmental body, such as Christian County, cannot be estopped by the unconstitutional, illegal and unauthorized acts of its officials.

Standard of Review

The Court granted transfer of this case pursuant to Mo. Const. Art. V, §10, following a decision by the Court of Appeals for the Southern District, Division One, which affirmed the granting of summary judgment in favor of Christian County and against Jones pursuant to Missouri. Rule Civil Procedure 74.04 (“Rule 74.04”). When considering appeals from summary judgments, the Court reviews the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). This review is essentially *de novo* because the propriety of summary judgment is purely an issue of law. *Id.*

Summary judgments play an essential role in our judicial system by allowing the trial court to enter judgment, without delay, where the moving party has demonstrated a right to judgment as a matter of law based on undisputed facts. *Id.* To parse out what facts are disputed, the “[f]acts set forth by affidavit or otherwise in support of a party’s motion are taken as true unless contradicted by the non-moving party’s response to the summary judgment motion.” *Id.* The non-moving party is accorded the benefit of all reasonable inferences from the record. *Id.*

In this case, the material facts are not in dispute. Rather, the parties to this appeal disagree as to whether, given those facts, Christian County was entitled to judgment as a matter of law. For the reasons set forth herein, MBA contends that summary judgment for Christian County was appropriate and should be affirmed.

I.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT FOR THE RESPONDENT BECAUSE THE JUDGMENT IS CONSISTENT WITH THE MISSOURI CONSTITUTION, ART. IV, §15 AND ART. VI, §23, AS WELL AS THE REVISED MISSOURI STATUTES, §110.270, WHICH LIMIT THE INVESTMENT AUTHORITY OF COUNTIES OVER PUBLIC FUNDS, IN THAT THE “DAILY PASSPORT CASH TRUST” ACCOUNT OFFERED BY JONES IN THIS CASE IS A TYPE OF MONEY MARKET MUTUAL FUND ACCOUNT, AND INVESTMENT OF COUNTY FUNDS IN MONEY MARKET MUTUAL FUND ACCOUNTS IS NOT AUTHORIZED BY THE MISSOURI CONSTITUTION OR STATUTES.

Money market mutual fund accounts, although similar in name to traditional money market *deposit* accounts, are not insured by the FDIC or any other agency of the federal government, and pose greater investment risk for public funds.

The record in this case reveals that the “Daily Passport Cash Trust” account opened by Jones for the deposit of Christian County’s funds was a “no-load money market mutual fund” account. (LF 101, 103). Although similar in name to traditional money market deposit accounts offered by banks, the two types of accounts are not to be confused because they are quite different.

A traditional money market account is a type of deposit account offered by banks, which earns interest at a rate set by, and paid by, the financial institution where the funds are deposited. *See* Fed. Deposit Ins. Corp., Insured or Not Insured? A Guide to What Is and Is Not Protected by FDIC Insurance, at <http://www.fdic.gov/consumers/consumer/information/fdiciorn.html>. As with most types of traditional bank accounts, money market deposit accounts are insured up to the legal limit of \$100,000.00 by the FDIC. State regulation specifically requires that this insurance feature apply to all custodians of county funds. *See* 12 CFR §330.15.⁴

⁴ 12 CFR §330.15 (2006) provides, in relevant part, as follows:

(2) Accounts of a state, county, municipality or political subdivision.

(i) Each official custodian of funds of any...county lawfully depositing such funds in an insured depository institution in the state comprising the public unit or wherein the public unit is located (including any insured depository institution having a branch in said state) shall be separately insured in the amount of :

(A) Up to \$100,000 in the aggregate for all time and savings deposits; and

(B) Up to \$100,000 in the aggregate for all demand deposits.

(ii) In addition, each such official custodian depositing such funds in an insured depository institution outside of the state comprising the public unit or wherein the public unit is located, shall be insured in the amount of up to \$100,000

By contrast, money market mutual fund accounts are not FDIC insured and are not deposit accounts; although the types of mutual fund investments vary among funds, they may consist of short-term securities such as Treasury bills, government or corporate bonds. *Id.* Mutual funds are protected against physical loss by the Securities Investor Protection Corporation (“SIPC”), a non-governmental entity funded by assessments paid by its members, which is payable if a member brokerage or bank brokerage subsidiary fails. *Id.* However, SIPC does not insure investments against loss in value of an account in any amount. *Id.*

The Missouri Constitution, Article IV, §15 does not authorize the investment of county funds in mutual fund accounts.

It has been cited by the parties that Section 110.270 of the Revised Missouri Statutes sets limits on the types of investments that may be made with county funds that are not needed for current operations.⁵ This section permits counties to invest only in the

in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits.

⁵ Section 110.270 provides, in relevant part, that:

Any county may place money of the county which it has determined is not needed for current operation in obligations described in section 15, article IV, Constitution of Missouri... Such obligations and agreements shall be purchased through institutions in the county whose deposits may be insured

types of obligations specifically described in and authorized by Art. IV, §15 of the Missouri Constitution for funds held in the custody of the state treasurer.⁶ Section

by an agency of the United States government, hereafter referred to as federally insured institutions, provided the county determines such purchases to be in the best interest of the county as determined by the county treasurer....

⁶ Mo. Const. Art. IV, §15 provides, in relevant part, that:

The state treasurer shall determine by the exercise of his best judgment the amount of moneys in his custody that are not needed for current expenses and shall place all such moneys on time deposit, bearing interest, in banking institutions in this state selected by the state treasurer and approved by the governor and state auditor or in obligations of the United States government or any agency or instrumentality thereof maturing and becoming payable not more than five years from the date of purchase. In addition the treasurer may enter into repurchase agreements maturing and becoming payable within ninety days secured by United States Treasury obligations or obligations of United States government agencies or instrumentalities of any maturity, as provided by law... As used in this section, the term “banking institutions” shall include banks, trust companies, savings and loan associations, credit unions, production credit associations authorized by act of the United States Congress, and other

110.270 further specifically mandates that the investments so authorized “shall be purchased through institutions in the county *whose deposits may be insured by an agency of the United States*”. §110.270 Jones is not such an institution, and its argument in this case violates this constitutional mandate even if Chapter 110 of the Revised Statutes is ignored. Nothing contained in §110.270 nor in Art. IV, §15 of the Constitution authorizes the investment of county funds in any type of mutual fund account.

Should the Court have any doubt that the legislature, in its wisdom, did not intend for counties to invest in mutual fund accounts, it need only look to the legislative history of H.B.1735 and S.B.1101, which were introduced in the 91st General Assembly, in 2002. These bills would have modified the investment powers of local governments and the state treasurer by amending §§30.260 and 30.270 and by adding a new §30.951, to allow the state treasurer to purchase money market mutual funds regulated by the Securities and Exchange Commission and to allow municipalities and political subdivisions to invest public money in such mutual funds through local government investment pools placed in the custody of the state treasurer. H.B. 1735 was voted on by the full House of Representatives and defeated by a vote of 102 to 41. *See* House Bill Tracking for H.B. 1735, available at <http://www.house.mo.gov/bills02/bills02/hb1735.htm>. S.B. 1101 was referred to Senate subcommittee and did not reach the full Senate. *See* Senate Bill

financial institutions authorized by act of the United States Congress, and other financial institutions which are authorized by law to accept funds for deposit or in the case of production credit associations, issues securities...

Tracking for S.B. 1101, available at <http://www.house.mo.gov/bills02/bills02/sb1101.htm>

Mo. Const. Article VI, §23 also does not authorize the investment of county funds in mutual fund accounts.

Article VI, §23 of the Missouri Constitution limits the authority of local governments with respect to owning corporate stock, using credit and granting public funds.⁷ Section 23 makes clear that counties have no inherent authority whatsoever to invest public money other than as expressly authorized by the Constitution. No provision of the Constitution, including Art. IV, § 15, expressly authorizes counties to invest in mutual fund accounts.

The Missouri Attorney General's office has reached this conclusion with respect to Mo. Const. Art. VI, §23 as it applies to an ambulance district, which is a political

⁷ Mo. Const. Art. VI, §23 provides as follows:

Limitation on ownership of corporate stock, use of credit and grants of public funds by local governments. No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.

subdivision of the State. *See* Mo. Att’y Gen. Opinion No. 26-88 (1988) (1988 Mo. AG LEXIS 20). In an advisory opinion to the St. Charles County Ambulance District, the Missouri Attorney General concluded that the ambulance district may not invest in mutual fund accounts because such types of investments are inconsistent with Art. VI, §23 of the Missouri Constitution. In reaching this conclusion, the attorney general reasoned that:

[t]here is no evidence Missouri voters intended the language in Article VI, Section 23 of the Missouri Constitution (1945) to have other than its ordinary and commonly understood meaning. The provision’s purposes, according to appellate courts of other states that have construed similar constitutional provisions, include keeping government out of private business...restricting the activities and functions of political subdivisions to government and prohibiting their direct or indirect engagement in commercial enterprise for profit...

(internal citations omitted). Accordingly, the Attorney General reasoned that an ambulance district is not authorized to invest in mutual funds under Mo. Const. Art. VI, §23.

The Attorney General’s reasoning applies with equal force in the case of Christian County. Art VI, §23 should be read logically so as to give effect to its intended public policy purpose of keeping political subdivisions out of private business and insulating public funds against loss due to entanglement in private enterprise. In view of the inherent risks associated with mutual fund investment, and the fact that such investments

are not federally insured, investment in mutual fund accounts would be inconsistent with Art. VI, §23 of the Missouri Constitution.

II.

THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT FOR THE RESPONDENT BECAUSE THE JUDGMENT CORRECTLY APPLIED THE REQUIREMENTS OF CHAPTER 110, §§110.130 *et seq.* R.S.Mo., WHICH OUTLINES THE PROCEDURE THAT MUST BE SUBSTANTIALLY FOLLOWED FOR A DEPOSITARY OF COUNTY FUNDS TO BE LEGALLY SELECTED AND WHICH PLACES SAFEGUARDS AROUND THOSE FUNDS IN THE HANDS OF PUBLIC OFFICIALS, IN THAT IT IS UNDISPUTED THAT APPELLANT HAD NOT BEEN SELECTED, AND HAD NOT QUALIFIED AS, A DEPOSITARY OF COUNTY FUNDS PURSUANT TO THE STATUTORY PROCEDURE WHEN MELTON TRANSFERRED COUNTY FUNDS FOR DEPOSIT WITH APPELLANT AND LATER MISAPPROPRIATED THOSE FUNDS TO HIS PERSONAL USE.

The requirements of Sections 110.010 to .060 and 110.030 to .270 must be substantially followed for a depositary of county funds to be legally selected.

It is well-settled law in Missouri that a county has no lawful authority to deposit any county funds except in a county depository. *Ralls County v. Commissioner of Finance*, 66 S.W.2d 115, 116 (Mo. 1933); *Huntsville Trust Co. v. Noel*, 12 S.W.2d 751, 755 (Mo. 1928). The law relating to “County Depositories”, which is currently codified in Chapter 110 of the Revised Missouri Statutes, §110.130 *et seq.* R.S.Mo., was

originally passed in 1889. *Huntsville Trust Co.*, 12 S.W.2d at 753. Although it has undergone various amendments, this law has remained substantially unchanged for more than a century. “All dealing with public officers and funds are charged with knowledge of the statutory provisions relating to county depositaries.” *Marion County v. First Savings Bank of Palmyra*, 80 S.W.2d 861, 863 (Mo. 1935) (Emphasis added).

Sections 110.010 to .060 and 110.030 to .270 outline the procedure for selecting depositaries into which county funds are required to be deposited. Those sections require that public funds of every county deposited in any banking institution acting as a legal depositary be secured in an amount not less than one hundred percent of the actual amount of the deposit. §110.010 - .020. In addition, “the county commission of each county ...shall receive proposals from banking corporations and associations at the county seat of the county which desire to be selected as the depositaries of the funds of the county...” after notice of the acceptance of bids has been published in the county. §110.130. “Any banking corporation or association in the county desiring to bid shall deliver to the clerk of the commission... a sealed proposal... Each bid shall be accompanied by a certified check for not less than the proportion of one and one-half percent of the county revenue of the preceding year... as a guaranty of good faith on the part of the bidder, that if his bid should be the highest he will provide the security required by section 110.010...” §110.140. “The county commission, at noon on the first day of the May term in each odd-numbered year, shall publicly open the bids, ...and shall select as the depositaries of all the public funds of every kind and description going into the hands of the county treasurer... the banking corporations or associations whose bids

respectively made for one or more of the parts of the funds shall in the aggregate constitute the largest offer for the payment of interest per annum for the funds...” §110.150.⁸

This Court has consistently held that if county funds are placed in a depository that has not been properly selected and qualified according to the statutory procedures, the normal debtor-creditor relationship does not arise; title to the funds so deposited does not pass to the depository, and the depository holds such funds merely as a trustee. *Ralls County*, 66 S.W.2d at 116; *In re Cameron Trust Co.*, 51 S.W.2d 1025, 1027 (Mo. 1932); *Huntsville Trust Co*, 12 S.W.2d at 758. Indeed, the deposit of county funds in other than a properly chosen and qualified depository is unlawful and such funds are regarded as unlawfully obtained. *Id.*

An entity receiving county funds without having qualified as a legal county depository holds those funds as a trustee *ex maleficio* for the county⁹. *Marion County*, 80 S.W.2d at 863; *Fidelity & Deposit Co. of Maryland v. People’s Bank*, 44 f.2d 19, 20-21 (8th Cir. 1930). As such, its absolute liability can only be relieved by restoring the funds

⁸ R.S.Mo. (1994).

⁹ A “trustee *ex maleficio* has been defined as “a trustee from wrongdoing; the trustee of a trust arising by operation of law from a wrongful acquisition.” and “One who, by reason of his own wrong or fraud in acquiring property is regarded as holding it as a trustee for the purpose of rectifying the wrong.” *Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056-57 (Mo. 1942).

to the county, and it may not presume that the county treasurer in withdrawing the funds will properly dispose of them. *Id.*

There is sound public policy behind this statutory requirement of qualification to hold funds in public trust, and the common law holding that failure to do so creates a trust *ex maleficio*. Such a conclusion is inescapable, regardless of the intent of an entity in Jones' position, or its belief that someone in Melton's position would properly dispose of the funds. Only by maintaining such a result can the State ensure that the public trust of public funds is safely maintained without any unnecessary level of risk in the investment. Public funds by definition demand a higher level of trust than an ordinary citizen's investments.

The statutory procedure for selecting depositories of county funds places necessary safeguards around those funds in the hands of public officials.

Public officials are custodians of public money, charged with the exercise of a duty of safe-keeping, and have only limited powers as provided by statute with respect to such funds. *Marion County*, 80 S.W.2d at 863; *Huntsville Trust Co.*, 12 S.W.2d at 758. County officials have no authority to deposit public funds except in a county depository that has been selected and qualified pursuant to statute. *Huntsville Trust Co.*, 12 S.W.2d at 757-58. Everyone dealing with public officials and public funds is charged with knowledge of the statutory provisions relating to county depositories. *Marion County*, 80 S.W.2d at 863.

The procedure outlined in Chapter 110 for selecting and qualifying depositaries of county funds furthers the crucial legislative objective of protecting those funds in the hands of public officials. *In re Cameron Trust Co.*, 51 S.W.2d 1025, 1026-27 (Mo. 1932). The statutes relating to county depositaries serve the public interest by ensuring that public officials, whether they may be reckless and corrupt, or well-intended but merely inexperienced, do not make unilateral investment decisions that could put public funds at risk. If a treasurer had a right to deposit county funds in a bank of his own choosing and the bank had the right to use these funds, it would destroy and nullify the protections the legislature has placed around these funds. *Cameron Trust*, 51 S.W.2d at 1027. Accordingly, the procedures set forth in §110.130 *et seq.* must apply equally to *all* depositaries of county funds, to preserve the trust reposed in public officials as custodians of public money.

Jones is liable to Christian County as a trustee *ex maleficio* for the return of county funds misappropriated by Melton.

In this case, the undisputed evidence is that at all relevant times before and after June 19, 1996, the only authorized depositary for Christian County funds selected according to the bidding process outlined in §110.130 *et seq.* was Ozark Bank (LF 36, 51). Jones did not submit a bid to become a legal County depositary of public funds, in violation of the requirements of §110.150. (LF 36, 51). Instead, Jones opened an

“unincorporated association” account while admittedly having knowledge that the funds to be deposited in the account were County funds. (LF 35, 81).

Even more troubling is the fact that someone in Jones’ home office instructed Askren to use a form for establishing an “unincorporated association” account, rather than a government account, in opening the account for the Christian County Building Fund. (LF 32, SLF 5).¹⁰ This conduct suggests that the Jones’ home office had no system for identifying and handling accounts involving public funds. Both at the time that Jones opened the “unincorporated association” account and at the time that Jones transferred the funds to Melton’s individual account, thereby depriving Christian County of the use and benefit of those funds, Jones was absolutely liable to Christian County for the return of those funds and had no right to assume that Melton would make a proper disposition of those funds. *Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056-57 (Mo. 1942). Jones is charged with knowledge of the law relating to county depositories, and must not be excused for its willful ignorance of that law.¹¹

¹⁰ The Supplemental Legal File is referred to herein as “SLF”.

¹¹ The Judgment of the trial court included the following findings of uncontroverted fact:

5. In July of 1996, Defendant Edward D. Jones purported to transfer funds from the Account to other accounts by electronic transfer, including transfers of \$350,000.00 on July 2, 1996 to an account of Gary Melton at Metropolitan National Bank and \$275,000.00 on July 3, 1996 to an account of Gary Melton at Metropolitan National Bank.

Jones' argument that it is not liable to Christian County as a trustee *ex maleficio* for failing to comply with the requirements of Chapter 110-- because it is a non-bank to which the requirements of the statute allegedly do not apply-- is unavailing. Jones' argument relies on a strained reading of the statute and contorts the cannon of statutory construction *expressio unus est exclusion alterius*. Although §110.150 expressly provides that bids shall be received from banking corporations or associations, it does not follow that non-banks, because they are not mentioned in the statute, are authorized to accept deposits of county funds without bidding. Such a strained construction of the statute would nullify the very protections for public funds created by the statute.

(LF 145). Further, the trial court concluded that Jones violated §110.240 “by paying out county money without requiring a check signed by the County Treasurer.” (LF 145).

MBA respectfully contends that it was not necessary for the trial court to reach the issue of whether Jones violated §110.240 because Jones' liability for the unlawful appropriation of County funds was complete when it accepted those funds into the “unincorporated association” account without having qualified as a lawful County depository and without submitting a bid in accordance with §110.140. Regardless of *how* the funds left the account, Jones, in becoming a trustee *ex maleficio* lost its right to presume that the County Treasurer in withdrawing the funds would properly dispose of them. Thus, Jones' absolute liability to the County could only be relieved by restoring the funds to the County. *Fidelity & Deposit Co. of Maryland v. People's Bank*, 44 F2d 19, 20-21 (8th Cir. 1930).

More importantly, such a construction ignores the constitutional mandate, which overrides any consideration to the contrary. Article IV, §15 and Article VI, §23 clearly restrict the ability of counties to invest public funds. Section 110.270 requires compliance with Article IV, §15. Section 15 also clearly defines “banking institution” in a way that would include Jones among “other financial institutions which are authorized by law to accept funds for deposit or in the case of production credit associations, issues securities.” However, under these constitutional provisions, Jones does not qualify as a “banking institution” “in the county whose deposits may be insured by an agency of the United States government, hereafter referred to as federally insured institutions” as clearly mandated by §110.270. Thus, Jones qualifies as a banking institution under Art. IV, §15 of the constitution, but it is not a *federally insured* institution as required for depositories county funds under §110.270. When the statutory prohibition is read in conjunction with the constitutional prohibition referred to in the statute, any claim that Jones does not have to qualify under the statute to receive public funds because it is not a “bank” is specious.

III.

THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT FOR THE RESPONDENT BECAUSE APPELLANT’S CLAIMED DEFENSES OF ESTOPPEL, WAIVER AND LACHES ARE INAPPLICABLE IN THAT IT IS UNDISPUTED THAT (1) MELTON ACTED ILLEGALLY AND WITHOUT ANY AUTHORITY IN OPENING AND DEPOSITING COUNTY FUNDS IN THE

“UNINCORPORATED ASSOCIATION” ACCOUNT WITH APPELLANT AND IN LATER TRANSFERRING THE FUNDS FROM THAT ACCOUNT TO ACCOUNTS IN HIS OWN NAME, AND IT IS WELL-SETTLED THAT A GOVERNMENTAL BODY IS NOT ESTOPPED BY THE ILLEGAL AND UNAUTHORIZED ACTS OF ITS OFFICERS AND (2) APPELLANT, LIKE EVERYONE DEALING WITH PUBLIC OFFICERS AND FUNDS, WAS CHARGED WITH KNOWLEDGE OF THE LAWS ENACTED FOR THE PROTECTION OF PUBLIC PROPERTY AND FAILED TO TAKE NOTICE THEREOF, AND, THEREFORE, COULD NOT REASONABLY RELY ON ANY STATEMENTS OF MELTON OR THE FAILURE TO ACT BY OTHER COUNTY OFFICIALS AS THE BASIS OF AN ESTOPPEL.

Melton acted illegally and without any authority in opening and depositing county funds in the “unincorporated association” account with Jones and in later transferring the funds from that account to accounts in his own name.

The only lawful method for selecting a depository of county funds is set forth in §§110.010 to .060 and 110.030 to .270 of Chapter 110. This Court has consistently held that placement of county funds in a depository that has not been properly selected and qualified according to the statutory procedures is unlawful and such funds are regarded as unlawfully obtained. *Huntsville Trust Co. v. Noel*, 12 S.W.2d 751, 758 (Mo. 1928).

In this case, it is undisputed that the statutory procedures for selecting and qualifying a county depository were not followed in opening the “unincorporated association” account with Jones. At all relevant times before and after June 19, 1996, the sole depository selected by the submission of sealed bids as provided in §§110.130 through 110.270 was Ozark Bank. (LF 36). Jones had not been selected as a depository of county funds. (LF 51). At no time did Christian County authorize the transfer of its funds to Jones. (LF 36). Accordingly, in opening the “unincorporated association” account with Jones, and in later transferring those funds to accounts in his own name (LF 94-96), Melton acted illegally and beyond the scope of his authority as treasurer of Christian County.

Estoppel is not a valid defense against Christian County due to the illegal and unauthorized acts of Melton.

Public officials act in a trust capacity, as servants of the public, with regard to public funds. *Fulton v. City of Lockwood*, 269 S.W.2d 1, 7 (Mo. 1954). All persons are charged with knowledge of the laws enacted for the protection of public property and are required to take notice of those laws. *Id.* Acts of public officials that exceed the scope of their authority are, and are known to be, unauthorized, and do not bind the principal. *Id.* at 7-8.

Estoppels are not favored in the law and the doctrine is not generally applicable against a governmental body. *State ex rel. Southland Corp v. City of Woodson Terrace*,

599 S.W.2d 529, 521-32 (No. App. E.D. 1980). It is well-settled in Missouri that a governmental unit is not estopped by illegal or unauthorized acts of its officers. *Id.* “The protection of the public and the declared public policy requires public officials to comply with mandatory statutory provisions, and such requirements may not be avoided by a compliance only when the official sees fit to comply.” *Fulton*, 269 S.W.2d at 8. In any case, estoppel must be based upon action taken in reasonable reliance. *B&D Inv. Co., Inc. v. Schneider*, 646 S.W.2d 759, 764 (Mo. banc 1983).

However, such a discussion of theories of estoppel does not end the inquiry in light of the clear constitution prohibition at issue in this case. It is a well established principle of constitutional jurisprudence that performance by a party in violation of a constitutional mandate is ineffectual and cannot create legal liability on the political subdivision on the theories of ratification, estoppel or implied contract. *Elkins-Swyers Office Equipment Co. v. Moniteau County*, 357 Mo. 448, 456, 209 S.W.2d 127, 131 (Mo.1948). It is not the prohibition against finding estoppel against a political entity that drives this principle; rather, it is the prohibition against being able to overcome the constitutional mandate by estoppel. No one has the authority to waive such a mandate. All persons dealing with public officials are charged with knowledge of the extent of that official’s authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. This particularly is so when the prohibition is a constitutional one. *Sager v. State Highway Com’n*, 349 Mo. 341, 353, 160 S.W.2d 757, 763 - 764 (Mo.1942).

In this case, Melton acted illegally and without authority as treasurer of Christian County in opening and depositing county funds in the “unincorporated association” account with Jones, and in later transferring those funds to accounts in his own name (LF 94-96). He did so in violation of the State Constitution. Therefore, Christian County cannot be estopped from seeking recovery by the illegal and unauthorized actions of Melton.

Jones, like everyone dealing with public officers and funds, was charged with knowledge of the laws enacted for the protection of public property and failed to take notice of those laws.

Jones, being charged with knowledge of the constitutional and statutory provisions intended to safeguard county funds, should have known that Melton had no authority to open the account. Yet, Jones not only opened the account, but also instructed its agent, Askren, to use a form for establishing the account as an “unincorporated association” account, rather than a government account, despite having knowledge that the funds being discussed as a deposit were county funds. (LF 35, 81). Jones’ willful ignorance of the statutes that were designed to protect county funds from the very type of malfeasance by public officials that occurred in this case, was the cause of loss of the county’s funds in the first instance; had Jones’ complied with the statutes for selecting and qualifying depositories of county funds, Melton would not have been able to commit the theft of the county’s funds.

Jones' reliance on *In re North Missouri Trust Co of Mexico, Mo.*, 39 S.W.2d 414 (Mo. App. St. L. 1931), to support its estoppel claim is misplaced. In that case, a school district had deposited funds in the Northern Missouri Trust Co. without advertising for bids. *Id.* at 416. The issue before the court was whether the school district was entitled to a preference claim in connection with the liquidation of the trust company. *Id.* The court noted that although there was a lack of literal compliance with the statutory requirements for selecting a depository, the school board had voted at its regular meeting that the funds be deposited, the trust company had agreed to pay interest and had given a security bond. *Id.* at 418. Therefore, the court concluded that "the district, by its long course of dealing, accepted and acquiesced in the trust company as its depository, and hence should now be estopped to deny the existence of contractual relations empower the trust company to serve in that capacity." *Id.* at 418. In so ruling, the court specifically noted that the contract had been entered into in good faith, the district had accepted the benefits to be derived from the contract, and no funds actually deposited had been lost by the district due to discharge by the bonding company of its obligations under the bond. *Id.*

North Missouri Trust does not control the instant case for several reasons. First, the contract with Jones in this case was not entered into in good faith, inasmuch as Melton had no lawful authority to enter into the contract. Unlike the school board in *North Missouri Trust* Christian County did not authorize the transfer of its funds to Jones. (LF 36). Further, in this case, unlike in *North Missouri Trust*, Christian County lost considerable funds as a result of the unauthorized contract.

Moreover, this Court decided *In re Cameron Trust Co.*, 51 S.W.2d 1025, 1026 (Mo. 1932) after *North Missouri Trust*, directly overruling the prior case. The Court in *Cameron Trust* concluded that “Whatever may be said of the ultimate result in [*In re North Missouri Trust*], we disapprove the holding that any legal contract can be entered into by a school board in the designation of a depository for school funds unless the provisions of the statute are complied with with reference to advertising for bids.” 51 S.W.2d at 1026. Further, the Court held that “Such contract made, without advertising for bids, is utterly void, and all parties thereto are parties to an illegal contract, and such contract could not be entered into in good faith. *Id.* The Court concluded that “the school district had no authority, whatever, by acquiescence, common consent, or by an express contract,” to enter into the contract at issue. *Id.*

Jones’ argument that it had a right to rely on Melton’s representations and the Presiding Commissioner’s failure to stop payment on the \$650,000 check drawn on the County’s account at Ozark Bank is flawed. Estoppel against a public entity must be based upon action taken in reasonable reliance. *B&D Inv. Co., Inc. v. Schneider*, 646 S.W.2d 759, 764 (Mo. banc 1983). Clearly, Jones could not reasonably rely on any statements made or actions taken by Melton that were unlawful and beyond his authority as provided by statute. Similarly, the Presiding Commissioner’s failure to stop payment on the check cannot form the basis for an estoppel against the county. Nothing in the record indicates that the Presiding Commissioner or any other county official had any knowledge that the funds were being transferred to Jones for an illegal purpose. Thus, their inaction is not sufficient to create an estoppel against the county.

CONCLUSION

For the foregoing reasons, and for those set forth in the brief of Plaintiff-Respondent Christian County, Missouri, the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that this 31st day of March, 2006, two (2) true and correct copies of the Amicus Curiae Brief of Missouri Bankers Association were delivered by courier locally and overnight delivery outside of St. Louis, Missouri to the parties listed below. The Brief was signed in compliance with Missouri Supreme Court Rule 55.03. Pursuant to Missouri Supreme Court Rule 84.06 (g), a 3.5 inch floppy disk containing the Brief in Microsoft Word for Windows, labeled and scanned for viruses and virus-free, was also hand delivered as above.

The undersigned further certifies as required by Missouri Supreme Court Rule 84.06(c) that the Amicus Curiae Brief of Missouri Bankers Association complies with the limitations contained in Rule 84.06(b). The number of words used in the Brief is shown to be 7031 by the word count of the word processing system used in preparing the Brief. A copy of the word count printed directly from the word processing system is attached to this Certificate. The Brief was prepared using Microsoft Word for Windows using a Times New Roman font in 13 point size.

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